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No. 04-1034

In the Supreme Court of the United States

JOHN A. RAPANOS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether wetlands that are adjacent to, and have a surface hydrological connection with, (a) a drain that flows into a creek that reaches traditional navigable waters, (b) a drain that flows into traditional navigable waters, and (c) a river that flows into traditional navigable waters, are part of "the waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7).

2. Whether application of the Clean Water Act to the wetlands at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 376 F.3d 629. The opinion of the district court (Pet. App. B1-B36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2004. A petition for rehearing was denied on November 2, 2004 (Pet. App. C1). The petition for a writ of certiorari was filed on January 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this civil enforcement action under the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1251 *et seq.*, alleging that petitioners had vio-

lated the CWA by discharging fill material into "waters of the United States" without a permit. After a 13-day bench trial, the district court ruled in the government's favor in relevant part, holding that petitioners' discharges at three of the sites in issue were prohibited by the CWA. Pet. App. B1-B36. The court of appeals affirmed. *Id.* at A1-A34.

1. Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant by any person," unless in compliance with the Act. 33 U.S.C. 1311(a). "Discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense.").[1] In *Riverside Bayview*,

[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362 and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

the Court upheld the assertion by the United States Army Corps of Engineers (Corps) of regulatory authority, under the CWA, over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." 474 U.S. at 135.

In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), this Court again construed the CWA term "waters of the United States." The Court in *SWANCC* held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense and includes wetlands that have a "significant nexus" to traditional navigable waters. See *id.* at 167, 172. The Court explained that, in *Riverside Bayview*, it had concluded "that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *Id.* at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). The Court stated, however, that "it is one thing to give a word limited effect and quite another to give it no effect whatever. The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172.

2. The CWA sets up two complementary permitting schemes for discharges from a point source into the waters of the United States. Section 404(a) authorizes the Secretary of the Army (acting through the Corps), or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). At all times relevant to this case, the State of Michigan had an approved Section 404 permit program covering the waters at issue in this petition. See 40 C.F.R. 233.70; Pet. App. A29. Under Section 402, any discharge of pollutants other than dredged or fill material must be authorized by a permit issued by the United States Environmental Protection Agency (EPA) (or a State with an approved program) under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c).

The Corps and EPA have promulgated identical regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). As it relates to this case, the definition encompasses, *inter alia*, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1); 40 C.F.R. 230.3(s)(1); "tributaries" to traditional navigable waters, see 33 C.F.R. 328.3(a)(5); 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to traditional navigable waters or their tributaries, see 33 C.F.R. 328.3(a)(7); 40 C.F.R. 230.3(s)(7).

3. Petitioners John A. Rapanos and Judith A. Nelkie Rapanos own three parcels of land near Midland, Michigan. Those parcels are referred to as the Salzburg, Hines Road, and Pine River sites. See Pet. App. A1-A2; *id.* at B2 n.1, B6, B34.[2]

a. In December 1988, Mr. Rapanos requested the Michigan Department of Natural Resources (MDNR) to inspect the Salzburg site in order to discuss the feasibility of building a shopping center there. Pet. App. B15. MDNR advised Mr. Rapanos that there were likely regulated wetlands on the site and sent him a permit application. *Ibid.* In March 1989, an MDNR official toured the site with Mr. Rapanos and again advised him that there were likely regulated wetlands on the site, but that the land might still be suitable for development if Mr. Rapanos identified the wetlands on the property and either refrained from discharging pollutants into those areas or obtained a permit to fill them. See *ibid.* A consultant hired by Mr. Rapanos determined that there were between 48 and 58 acres of wetlands on the site. *Ibid.*; see *id.* at A2.

In response, Mr. Rapanos ordered the consultant to destroy his report and stated that he would "destroy" the consultant if he refused to comply. Pet. App. A2; *id.* at B15. Without applying for a permit, Mr. Rapanos then directed the performance of extensive land clearing, earthmoving, and construction work. *Id.* at B12, B14, B34. Those activities—which continued despite MDNR's issuance of a cease-and-desist letter in July

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[2] At all relevant times, petitioner John A. Rapanos owned the Salzburg site; petitioner Prodo, Inc. (whose president and sole shareholder is Mr. Rapanos) owned the Hines Road site; and petitioners Judith A. Nelkie Rapanos and Pine River Bluff Estates, Inc. (whose president and sole shareholder is Mrs. Rapanos) owned the Pine River site. Pet. App. B6, B34. Mr. Rapanos also identified petitioner Rolling Meadows Hunt Club as owning the Hines Road site. *Id.* at B23.

1989 and EPA's issuance of an administrative compliance order in May 1991 (*id.* at B13, B30)—included dumping sand into forested wetlands and spreading fresh spoils and sand on top of wetland vegetation. *Id.* at B12-B14.

Between 1988 and 1997, Mr. Rapanos's fill activities resulted in the loss of 22 of the 28 acres of wetlands identified by the government at the Salzburg site. Pet. App. A5; *id.* at B11, B14. Surface water from wetlands at the Salzburg site flows into the Hoppler Drain, located immediately north of the site, which drains into Hoppler Creek. *Id.* at A22. Hoppler Creek, in turn, "flows into the Kawkawlin River, which is navigable," and which "eventually flows into Saginaw Bay and Lake Huron." *United States* v. *Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003) (*Rapanos I*), cert. denied, 541 U.S. 972 (2004).[3] The wetlands on the Salzburg site "have been described as between eleven and twenty miles from the nearest navigable-in-fact water." *Ibid.*

b. At the Hines Road site, Mr. Rapanos and petitioner Prodo, Inc., hired several contractors to perform construction and earthmoving work between 1991 and 1997 without obtaining a permit. Pet. App. B21-B23, B34. That work—which continued despite MDNR's issuance of a cease-and-desist letter in July 1992 and

[3] *Rapanos I*, *supra*, is one of several decisions of the Sixth Circuit flowing from a related criminal proceeding. In that proceeding, Mr. Rapanos was convicted of knowingly discharging pollutants into waters of the United States without a permit at the Salzburg site, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A). Pet. App. B6; see *id.* at A4-A5 (setting forth history of the criminal case). Although the criminal and civil cases both involved the Salzburg site, the wetlands at issue in the respective cases were identified in different manners. See *id.* at A5 n.1, A22-A23 n.3, A32.

EPA's issuance of an administrative compliance order in September 1997—included the filling of wetlands with sidecast and spoils. *Id.* at A3; *id.* at B21, B23, B31. Those activities resulted in the loss of 17 of the 64 acres of wetlands at the Hines Road site. *Id.* at A5; *id.* at B20, B22-B23. Those wetlands have a surface hydrologic connection to the Rose Drain, which runs along the western side of the site and flows into the Tittabawassee River. *Id.* at A23; *id.* at B20. The Tittabawassee River is a traditional navigable water. See Gov't C.A. Br. 12.

c. At the Pine River site, Prodo, Inc., and several contractors performed construction work under the general direction of Mr. Rapanos between 1992 and 1997 without securing a permit. Pet. App. A3; *id.* at B26-B27, B34. That work—which continued despite MDNR's issuance of a cease-and-desist order in October 1992 and EPA's issuance of an administrative compliance order in September 1997 (*id.* at B28, B36)—included pushing sand into forested wetlands. *Id.* at B27-B28. Those activities resulted in the loss of 15 of the 49 acres of wetlands at the Pine River site. *Id.* at A5; *id.* at B25-B26, B27. Those wetlands have a surface water connection to the Pine River, which lies in close proximity to the site. *Id.* at A23-A24; *id.* at B26. The Pine River, in turn, flows into Lake Huron. *Id.* at A23.

4. a. In February 1994, the United States filed this civil suit in the District Court for the Eastern District of Michigan. Pet. App. A5; *id.* at B1. As subsequently amended, the government's complaint alleged, in relevant part, that petitioners had violated Section 301 of the CWA, 33 U.S.C. 1311, by discharging fill material into "waters of the United States" at the Salzburg,

Hines Road, and Pine River sites without a permit. C.A. App. 68-71.

b. On March 24, 2000, after a 13-day bench trial, the district court ruled in favor of the United States on the question of liability. Pet. App. B1-B36. The district court found that the demonstrated surface hydrological connections between the wetlands at the Salzburg site and the Kawkawlin River, between the wetlands at the Hines Road site and the Tittabawassee River, and between the wetlands at the Pine River site and the Pine River, established that the sites contained wetlands that were "adjacent to waters of the United States" and therefore were encompassed by the Corps' regulations implementing the CWA. *Id.* at B33; see 33 C.F.R. 328.3(a)(7) ("waters of the United States" include wetlands that are "adjacent" to traditional navigable waters or their tributaries).[4] The court held that, by discharging pollutants into those wetlands without a Section 404(a) permit, Mr. Rapanos, Mrs. Rapanos, Prodo, Inc., and petitioner Pine River Bluff Estates, Inc. (see note 2, *supra*) had violated CWA Section 301(a). Pet. App. B34-B35.

5. The court of appeals affirmed. Pet. App. A1-A34. Relying in part on its prior decision in *Rapanos I*, the court rejected petitioners' contention that it should "impose a 'direct abutment' requirement to CWA jurisdiction over non-navigable water." *Id.* at A20-A21. The

[4] In the alternative, the district court held that the assertion of federal regulatory jurisdiction over the wetlands at the three sites was also warranted on the basis of the "Migratory Bird Rule." See Pet. App. A6 n.2, B33. On January 10, 2003, after the "Migratory Bird Rule" was declared invalid in *SWANCC* (see p. 3, *supra*), the district court amended its opinion to delete that alternative basis for CWA jurisdiction. *Id.* at A6 n.2.

court explained (*id.* at A15-A17, A20) that in *Rapanos I*, it had adopted the reasoning of *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004), which held that the "nexus between a navigable waterway and its nonnavigable tributaries * * * is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted." See Pet. App. A17; *Rapanos I*, 339 F.3d at 452 (quoting *Deaton*, 332 F.3d at 712). The court of appeals thus concluded that "[t]here is no 'direct abutment' requirement in order to invoke CWA jurisdiction"; rather, "[n]on-navigable waters must have a hydrological connection or some other 'significant nexus' to traditional navigable waters in order to invoke CWA jurisdiction." Pet. App. A21; see *id.* at A16.

The court of appeals further concluded that petitioners' wetlands "are interconnected with traditional navigable waters." Pet. App. A21. The court found that the evidence demonstrated "hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters." *Id.* at A24. The court of appeals noted the district court's finding that the wetlands at the Salzburg site "have a surface water connection to tributaries of the Kawkawlin River which, in turn, flows into the Saginaw River and ultimately into Lake Huron." *Id.* at A22. The court of appeals also noted testimony establishing that the wetlands at the Hines Road site have a surface water connection to the Rose Drain, which flows into the Tittabawassee River. *Id.* at A23. The court similarly noted testimony demonstrating that the wetlands at the Pine River site have a surface water connection to the Pine River, which flows into Lake Huron. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not squarely conflict with any decision of this Court or of another court of appeals. Approximately one year ago, this Court denied three petitions for writs of certiorari (including one filed by Mr. Rapanos) that raised questions substantially similar to those presented here. See *Newdunn Assocs., LLP* v. *United States Army Corps of Eng'rs*, 541 U.S. 972 (2004) (No. 03-637); *Deaton* v. *United States*, 541 U.S. 972 (2004) (No. 03-701); *Rapanos* v. *United States*, 541 U.S. 972 (2004) (No. 03-929). There is no reason for a different result in this case.

1. Petitioners contend (Pet. 6-9) that the court of appeals' conclusion that the CWA applies to the wetlands at issue in this case is inconsistent with this Court's decisions in *Riverside Bayview* and *SWANCC*. Petitioners read those decisions as flatly prohibiting "federal regulation of wetlands that do not physically abut a traditional navigable water." Pet. 7. That claim lacks merit.

a. The Corps and EPA regulations defining the CWA term "the waters of the United States" have long been premised on the fact that, because "[w]ater moves in hydrologic cycles," pollution of waters that do not themselves meet traditional tests of navigability "will affect the water quality of the other waters within that aquatic system." *Riverside Bayview*, 474 U.S. at 134 (quoting 42 Fed. Reg. 37,128 (1977)); see *Deaton*, 332 F.3d at 707 ("[T]he principle that Congress has the authority to regulate discharges into non-navigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act."); *Rapanos I*, 339

F.3d at 451 ("As common sense makes clear, the Clean Water Act cannot purport to police only the navigable-in-fact waters in the United States in order to keep those waters clean from pollutants."). Inclusion of nonnavigable tributaries and their adjacent wetlands within the coverage of the CWA is consistent with Congress's efforts to ensure that the quality of traditional navigable waters is adequately protected. Accordingly, the Corps and EPA have reasonably defined the term "waters of the United States" to include wetlands adjacent to tributaries that flow into traditional navigable waters.[5]

b. This Court's decision in *SWANCC* does not cast doubt on the propriety of that regulatory determination. To the contrary, the Court in *SWANCC* quoted with apparent approval its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" 531 U.S. at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). And while the Court in *SWANCC* rejected the Corps' construction of the term "waters of the United States" as encompassing "isolated" ponds based solely on their use as habitat for migratory birds, *id.* at 171-172, its reasoning does not undermine the assertion of federal regulatory authority here.

The Court in *SWANCC* explained that, if the use of isolated ponds by migratory birds were found by itself to be a sufficient basis for federal regulatory jurisdic-

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[5] "Adjacent" is defined as "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. 328.3(c) (Corps definition); see 40 C.F.R. 230.3(b) (same EPA definition).

tion under the CWA, the word "navigable" in the statute would be rendered superfluous. 531 U.S. at 172. While recognizing that the term "navigable waters" as used in the CWA includes "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 171 (quoting *Riverside Bayview*, 474 U.S. at 133), the Court stressed that the word "navigable" must be given some substantive content, see *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). The Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

Unlike the Corps' effort in *SWANCC* to regulate "isolated" waters based solely on their use as habitat by migratory birds, the regulation of petitioners' conduct rests squarely on the longstanding authority of the federal government to protect traditional navigable waters. "Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." *Deaton*, 332 F.3d at 707. Construing the CWA term "waters of the United States" to encompass wetlands adjacent to tributaries that flow into traditional navigable waters thus gives independent content to the term "navigable," and accords with the established understanding of congressional power to regulate and protect traditional navigable waters. See *id.* at 707, 709-710; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525-526 (1941) (Congress may authorize flood control projects on intrastate non-navigable tributaries in order to pre-

vent flooding in traditional navigable rivers); see also *Treacy* v. *Newdunn Assocs., LLP*, 344 F.3d 407, 417 (4th Cir. 2003) (upholding CWA jurisdiction over wetlands with an intermittent surface water connection to a series of natural and man-made waterways that drain into an arm of a traditional navigable water), cert. denied, 541 U.S. 972 (2004); *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 533-534 (9th Cir. 2001) (upholding CWA jurisdiction over nonnavigable irrigation canals that receive water from, and divert water to, natural streams and lakes). The demonstrated risk that pollutant discharges into wetlands and their adjacent tributaries will ultimately impair the quality of traditional navigable waters, and the proven surface water connection between the wetlands on the Salzburg site and the Kawkawlin River (and ultimately Lake Huron), between the Hines Road site and the Tittabawassee River, and between the Pine River site and the Pine River (and ultimately Lake Huron), establish that petitioners' wetlands fall within the jurisdictional reach of the CWA.

c. Concededly, not every discharge of fill material into "the waters of the United States" (as the Corps and EPA have defined the term) can be expected to have deleterious effects on the quality of traditional navigable waters. That fact, however, does not cast doubt on the propriety of the agencies' adjacent wetlands regulations. As the Court in *Riverside Bayview* explained:

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as

> "waters." * * * That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n.9. Thus, inclusion of petitioners' wetlands within the regulatory definition of "waters of the United States" does not mean that filling of such wetlands is necessarily prohibited. It simply means that the Corps (or, in this case, the Michigan permitting agency, see p. 4, *supra*) will analyze (and attempt to mitigate) the likely impacts of proposed discharges before deciding whether a particular project may go forward. By discharging pollutants into their wetlands without seeking a Section 404 permit, petitioners prevented the state permitting agency from making that determination.

d. In contending that the CWA covers only those wetlands that physically abut traditional navigable waters (Pet. 7), petitioners invoke (*ibid.*) this Court's statement in *SWANCC* that jurisdictional authority under the CWA does not "extend[] to ponds that are *not* adjacent to open water." 531 U.S. at 168. Petitioners appear to construe the term "open water," as it appears in the *SWANCC* opinion, to refer solely to traditional navigable waters.

Petitioners' effort to equate the term "open water" with traditional navigable waters is unfounded. When

the Court in *SWANCC* referred to ponds "that are *not* adjacent to open water," 531 U.S. at 168, it was alluding to a footnote in *Riverside Bayview* in which the Court had reserved the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, see 33 C.F.R. 323.2(a)(2) and (3) (1985)." *Riverside Bayview*, 474 U.S. at 131-132 n.8 (quoted in *SWANCC*, 531 U.S. at 167-168). When that footnote is read in context, it is clear that the Court in *Riverside Bayview* was reserving the question of jurisdiction over wetlands that are isolated from, rather than adjacent to, any other regulated waters, without regard to those waters' navigability.[6]

Elsewhere in the *Riverside Bayview* opinion, moreover, the Court used the phrase "open water" as a shorthand for "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters,'" in order to distinguish those types of water bodies from wetland areas, such as "shallows, marshes, mudflats, swamps [and] bogs." *Riverside Bayview*, 474 U.S. at 131-132. The Court did not use the phrase "open water" to distinguish navigable from nonnavigable streams. See, *e.g.*, *id.* at 134 (using the phrase "adjacent bodies of open water" interchangeably with "adjacent lakes,

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[6] The pertinent footnote in *Riverside Bayview* cited 33 C.F.R. 323.2(a)(2) and (3) (1985), which have since been re-codified at 33 C.F.R. 328.3(a)(2) and (3). Those are the subsections of the regulatory definition of "waters of the United States" that cover interstate and isolated intrastate wetlands, respectively. If, by referring to "wetlands that are not adjacent to bodies of open water," the Court had meant to include wetlands adjacent to nonnavigable tributaries, it would presumably have cited as well 33 C.F.R. 323.2(a)(5) and (7) (1985), which encompass nonnavigable tributaries and wetlands adjacent to those tributaries.

rivers, and streams," without reference to navigability). Finally, under petitioners' interpretation of the term "open water," the CWA would not encompass wetlands adjacent to nonnavigable tributaries, even if those tributaries are themselves part of "the waters of the United States." That view cannot be reconciled with *Riverside Bayview*'s square holding that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135.

2. Contrary to petitioners' contention (Pet. 9-13), the Sixth Circuit's decision in this case does not squarely conflict with any decision of another court of appeals.

a. Petitioners' reliance (Pet. 10-11) on *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is misplaced. *Rice* addressed the question whether the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, imposed liability on parties who discharged oil onto dry ground, where that oil was alleged to have migrated into various types of waters. See *Rice*, 250 F.3d at 265-266. Like the CWA, the OPA regulates discharges into "navigable waters," defined as "the waters of the United States." 33 U.S.C. 2701(21); see 33 U.S.C. 2702(a). The term is generally understood to have the same meaning under both statutes. See *Rice*, 250 F.3d at 267-268.

The court in *Rice* rejected each of three suggested bases for the imposition of OPA liability. First, the Fifth Circuit addressed the question whether the OPA regulated "discharges of oil that contaminate the groundwater," and it held that "subsurface waters are not 'waters of the United States' under the OPA." 250 F.3d at 270. Second, the court in *Rice* addressed the

plaintiffs' contention that "surface waters on the [property] are directly threatened by [the defendant's] discharges into the groundwater." *Ibid.* The court found that all discharges were onto dry land and that there was no evidence of any discharge directly into surface water. *Ibid.* The court further concluded that, even if the discharges could be shown to have seeped into the surface waters on the ranch, the record was insufficient to support a determination that those waters were part of "the waters of the United States." The court explained that the record in the case contained "no detailed information about how often the creek runs, about how much water flows through it when it runs, *or about whether the creek ever flows directly (above ground) into the Canadian River.*" *Id.* at 270-271 (emphasis added). Absent proof of a surface connection between the creek in question and any traditional navigable water, the court was unable to conclude that the creek was "sufficiently linked to an open body of navigable water as to qualify for protection under the OPA." *Id.* at 271. Third, the court in *Rice* addressed the question whether "discharges into groundwater that migrate into protected surface waters" are covered by the OPA. *Ibid.* The court held that the OPA does not apply to "discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

Thus, the Fifth Circuit's decision in *Rice* was premised on the absence of any demonstrated surface water connection between the allegedly contaminated seasonal creek and any traditional-navigable water. The decision therefore does not conflict with the Sixth Circuit's ruling in the instant case, which upheld the exer-

cise of federal regulatory authority under the CWA based on the presence of such a surface water connection with respect to each of the three wetland sites at issue here.

b. For similar reasons, the Fifth Circuit's decision in *In re Needham*, 354 F.3d 340 (2003), see Pet. 11-12, does not squarely conflict with the Sixth Circuit's decision in this case. *Needham*, like *Rice*, involved a suit under the OPA. See 354 F.3d at 342. The oil at issue in *Needham* "was originally discharged into [a] drainage ditch at Thibodeaux Well," and from there "spilled into Bayou Cutoff, and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico." *Id.* at 343. The Fifth Circuit held that the defendants' conduct was covered by the OPA. *Id.* at 346-347. The court stated that "the proper inquiry is whether Bayou Folse, the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at 346. The Fifth Circuit found that "Bayou Folse is adjacent to an open body of navigable water, namely the Company Canal," *ibid.*; and it concluded on that basis that "the Thibodeaux Well oil spill implicated navigable waters and triggered federal regulatory jurisdiction pursuant to the OPA," *id.* at 347.

In the course of its analysis, the Fifth Circuit appeared to disapprove the results reached by the Sixth and Fourth Circuits in *Rapanos I* and *Deaton*, and it stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." 354 F.3d at 345. That statement was dictum, however, in light of the *Needham* court's determination that the oil spill

actually involved in that case was covered by the OPA. And while the *Needham* court stated that "both the regulatory and plain meaning of 'adjacent' mandate a significant measure of proximity," *id.* at 347 n.12, and that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway," *id.* at 347, the court did not offer a precise rule for determining when a nonnavigable tributary is "adjacent" to a traditional navigable water. Thus, even assuming that the Fifth Circuit follows the *Needham* dictum in a future case where the issue is actually presented, it is unclear to what extent the approaches taken by the Sixth and Fifth Circuits would lead to different results in concrete factual settings.

It should also be noted that the Fifth Circuit in *Needham* sustained the application of the OPA to the defendants' conduct based on the ultimate downstream presence of oil in Bayou Folse. See 354 F.3d at 346-347; p. 18, *supra*. The court did not examine whether the drainage ditch (the site of the original discharge) or Bayou Cutoff (the body of water into which the ditch directly flowed) was itself "adjacent" (as the court understood that term) to any traditional navigable water. Rather, the court framed the relevant question as "whether Bayou Folse, the site of the farthest traverse of the spill," satisfied the court's adjacency requirement. *Id.* at 346.

Thus, where it can be shown that an oil discharge has actual downstream effects, the Fifth Circuit (correctly) regards the OPA as applicable even if the first water body into which oil is discharged does not meet the court's standard for being "actually navigable or * * * adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. The Fifth Circuit's willingness to

consider the downstream effects of an oil discharge in determining the applicability of the OPA further diminishes the current practical significance of that court's dictum expressing apparent disagreement with the regulatory approach adopted by the government and sustained by the Sixth Circuit in this case.

3. a. In *SWANCC*, this Court found that application of the CWA to intrastate, nonnavigable, isolated waters, based solely on the presence of migratory birds, would raise serious constitutional questions. See *SWANCC*, 531 U.S. at 172-173. Petitioners contend (Pet. 14-26) that application of the CWA to the wetlands at issue here would raise similar constitutional concerns and would exceed congressional authority under *United States* v. *Lopez*, 514 U.S. 549 (1995). Petitioners did not raise their constitutional claim before the court of appeals panel, however, nor did the panel address it. Petitioners' claim therefore is not properly preserved for review by this Court. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).[7]

b. In any event, every court of appeals that has addressed the question has held that the CWA may constitutionally be applied to nonnavigable tributaries and

[7] Petitioners raised their constitutional claim for the first time in a petition for rehearing and suggestion for rehearing en banc, which was summarily denied by the court of appeals. See Pet. for Reh'g 1 (seeking rehearing on the question "whether the Clean Water Act, as applied to adjacent wetlands, exceeds Congress's Commerce Clause authority"); Pet. App. C1. By raising their constitutional claim at that belated juncture, petitioners failed to preserve it for this Court's review. Cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).

their adjacent wetlands.[8] Petitioners' constitutional challenge lacks merit and does not warrant this Court's review.

Contrary to petitioners' contention (Pet. 14-15), the assertion of federal regulatory authority over petitioners' wetlands is faithful to this Court's holding in *SWANCC* that the word "navigable" must inform the interpretation of the jurisdictional reach of the CWA. The isolated waters at issue in *SWANCC* had no hydrological connection, and the asserted basis for CWA jurisdiction bore no relation, to traditional navigable waters. By contrast, the wetlands in issue here have an established surface water connection to the Kawkawlin River (and ultimately to Lake Huron) at the Salzburg site, to the Tittabawassee River at the Hines Road site, and to the Pine River (and ultimately to Lake Huron) at the Pine Road site. Because the Corps' exercise of regulatory authority over petitioners' wetlands and discharges serves the federal goal of protecting and enhancing water quality in traditional navigable waters, this case implicates core federal interests that were not present in *SWANCC*. See pp. 11-13, *supra*. Congress's "power over navigable waters is an aspect of the author-

[8] See, *e.g.*, *United States* v. *Pozsgai*, 999 F.2d 719, 733-734 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *United States* v. *Hartsell*, 127 F.3d 343, 348-349 (4th Cir. 1997); *United States* v. *Tull*, 769 F.2d 182, 185 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325-1329 (6th Cir. 1974); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979). See also *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 n.21 (1981) (citing favorably to *Ashland Oil* and *Byrd* and agreeing that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of [intrastate] activities causing air or water pollution, or other environental hazards that may have effects in more than one State").

ity to regulate the channels of interstate commerce," *Deaton*, 332 F.3d at 706—the first of the three categories of permissible Commerce Clause legislation identified by this Court in *Lopez*, 514 U.S. at 558—and that power "carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters," *Deaton*, 332 F.3d at 707.

Riverside Bayview squarely held that the Corps and EPA may assert regulatory authority over at least *some* wetlands and other waters that do not themselves meet traditional tests of navigability, based on their connections to traditional navigable waters. See 474 U.S. at 133.[9] And while *Riverside Bayview* did not involve a Commerce Clause challenge to the Corps' regulation, petitioners do not question Congress's constitutional authority to regulate pollutant discharges into wetlands

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[9] The courts have long recognized that pollution and environmental degradation in the nonnavigable portion of a tributary system can be expected, as a general matter, to have an adverse effect on water quality in the traditional navigable waters to which those tributaries lead. As the Sixth Circuit explained over 30 years ago:

> It would, of course, make a mockery of [Congress's Commerce Clause] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.
>
> Such a situation would have vast impact on interstate commerce.

United States v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).

that directly abut traditional navigable waters; indeed, petitioners urged the court of appeals to adopt a "direct abutment" jurisdictional rule as a matter of statutory interpretation. See Pet. 6-7; Pet. App. A20-A21. Once it is accepted that Congress can protect *some* intrastate waters (including wetlands) that do not themselves satisfy traditional standards of navigability, based on the danger that discharges into those waters may impair the quality of traditional navigable waters downstream, there is no principled reason to conclude that Congress's *constitutional* authority turns on whether the hydrologic link to traditional navigable waters in a particular case is "direct" or "indirect."

Petitioners' reliance (Pet. 21-25) on this Court's decision in *Lopez* is misplaced. *Lopez* considered the validity of a federal statute under the third of three categories of permissible Commerce Clause legislation identified by the Court, *i.e.*, the regulation of activities that "substantially affect" interstate commerce. 514 U.S. at 558-559. The present case, however, involves legislation falling within the first category of permissible Commerce Clause legislation identified by the Court, *i.e.*, regulation of the use of the channels of interstate commerce. *Id.* at 558. As the court in *Deaton* correctly concluded, Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce," 332 F.3d at 706, and that power "carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters," *id.* at 707. *Lopez* does not cast doubt on that sound reasoning.

Moreover, even with respect to legislation falling within the third *Lopez* category, a reviewing court need

only find that a "rational basis exist[s] for concluding that a regulated activity" substantially affects interstate commerce. 514 U.S. at 557. Here, there is considerably more than a "rational basis" for concluding that discharges of pollutants into wetlands that are adjacent to and have a surface water connection with nonnavigable tributaries of traditional navigable waters have a substantial effect, in the aggregate, on the downstream navigable waters. See *id.* at 558. As a general matter, the harm caused by discharges of dredged or fill material into wetlands includes, but is not limited to, the release of sediment downstream. An even greater harm arises from the *filling* of wetlands, which, as a general matter, reduces or destroys their capacity to perform a variety of essential hydrological and ecological functions, such as filtering and absorbing pollutants from runoff and storing flood waters. See *Riverside Bayview*, 474 U.S. at 134-135. And, based on expert testimony credited by the district court in this case, the court found that petitioners' filling of the wetlands at each of the three sites resulted in just such harm. See Pet. App. B12 (lost functions of wetlands at the Salzburg site included water quality enhancement and flood control); *id.* at B21, B26 (same findings regarding Hines Road and Pine River wetlands).

c. Petitioners contend that, if the CWA is construed to cover the discharges at issue here, the Act would "completely obliterate the Constitution's distinction between national and local authority." Pet. 25 (quoting *United States* v. *Morrison*, 529 U.S. 598, 615 (2000)). That contention lacks merit. Even with respect to those waters that are encompassed by the regulatory definition of "waters of the United States," the only activity that requires a CWA permit is the discharge of a pollutant (including dredged spoil, sand, and rock) from a point source into the waters of the United States.[10] Other functions and activities relating to land use remain in the hands of the local authorities. In addition, the CWA provides States the opportunity to assume responsibility for the administration of the Sections 402 and 404 permitting programs. See p. 4, *supra*. Because the State of Michigan has an approved permitting program covering the waters at issue here, state rather than federal regulators would have acted on any permit application that petitioners submitted. Petitioners' claim of unconstitutional intrusion on state regulatory authority is therefore particularly unavailing under the circumstances of this case.

In any event, the federal government possesses longstanding authority to protect the quality of traditional navigable waters by regulating upstream pollutant discharges. See pp. 12-13, *supra*. As cases like *Riverside Bayview* make clear, the exercise of that authority may as a practical matter affect activities (*e.g.*, residential housing development, see *Riverside Bayview*, 474 U.S. at 124) that are also subject to extensive state regulation. See *Deaton*, 332 F.3d at 707 ("The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers."). So long as the assertion of federal regulatory authority

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[10] Moreover, once the Corps or EPA has issued its final decision on a CWA permit application, that decision is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Thus, even with respect to development activities that involve pollutant discharges into "the waters of the United States," petitioners' suggestion (Pet. 25) that the CWA gives federal regulators a "virtual veto power" over those projects is considerably overstated.

in this case was an otherwise permissible use of the power to protect traditional navigable waters, the requirement that petitioners seek a CWA permit for their fill activities does not impermissibly encroach on state and local land-use planning. See *id.* at 707-708.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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